(4)

Supreme Court, U.S.
FILED
OCT 4 2001
OFFICE OF THE CLERK

No. 00-1924

IN THE

Supreme Court of the United States

B.J.M.,

Petitioner,

v.

FAMILY OPTIONS; E.R.B. AND P.L.B., his wife,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

REPLY BRIEF

HAROLD J. CASSIDY
Counsel of Record
961 Holmdel Road
Holmdel, NJ 07733
(732) 332-9300

ROBERT W. GOODMAN
50 Main Street
Hackensack, NJ 07601
(201) 488-7100

JOSEPH E. MARLEY
66 W. Mt. Pleasant Avenue
Livingston, NJ 07039
(973) 422-1771

Attorneys for Petitioner

169806

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

15 pp

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Legal Argument 1

This Court Should Grant The Writ Of Certiorari And Decide This Case On The Merits 1

A. The Irrevocable Nature Of The Surrender Document 1

B. The Findings Of The Trial Court 5

Conclusion 6

Appendix — Adoption Statutes Of The Fifty States .. 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

In the Matter Baby M., 537 A.2d 1227 (1988) 2, 4

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 3, 4, 6

Santosky v. Kraemer, 455 U.S. 748 (1982) 3, 4, 6

Sees v. Baber, 377 A.2d 628 (1977) 2, 4

Statute:

N.J.S.A. 9:3-41(a) 3

LEGAL ARGUMENT

This Court Should Grant The Writ Of Certiorari And Decide This Case On The Merits

The arguments advanced to this Court by counsel for defendants Family Options, and E.R.B. and P.L.B., rely almost exclusively on: (1) the trial court's findings of fact which were adverse to the petitioner B.J.M. (Brief of E.R.B. and P.L.B., at P.8; P.1; brief of Family Options, P.1 to 8); and (2) the existence of the waiver document, being irrevocable under state law, disposes of the need to comply with any requirements of Due Process (Family Options, P.11-27; E.R.B. and P.L.B., P.5 to 15). These two points, taken here in reverse order, actually demonstrate why the New Jersey law violates petitioner's Due Process rights and underscore the need for this Court to grant the writ and decide the case on its merits.

A. The Irrevocable Nature Of The Surrender Document

The reality is that the termination of petitioner's rights entered by the state in this case was totally involuntary. It was entered over the objection of the petitioner, and only after she spent two weeks in trial attempting to persuade the trial court not to enter an order which would later be used as the basis to terminate her fundamental interest. It is, therefore, a misnomer to characterize this case as a "voluntary" termination.

Of course, the basis for the involuntary termination in this case is the allegation that the defendant Family Options obtained from petitioner, at a prior time, a document evidencing the petitioner's intention to voluntarily waive her fundamental constitutional right to her relationship with her child. It is asserted by defendants that the mere existence of this document, and the irrevocable nature attached to it under state law, removes all need for the state to adhere to any requirements of Due Process as the state conducts trials and hearings leading to the termination of the mother's fundamental rights. (*See*, e.g. brief Family Options, P.11 to 20)

First, as a result of the mere allegation of the existence of the document, the New Jersey Court presumes that the surrender was voluntarily obtained, all conditions for its irrevocability were met, and it constitutes a voluntary, informed, knowing waiver of the mother's constitutional rights.

That assumption subsumes factual considerations relevant to both state adoption law and federal constitutional standards applied to waiver of basic human rights.

The New Jersey Supreme Court has held that there are conditions to be met for "irrevocability" to attach to a relinquishment document taken by a licensed adoption agency.

> "These strict prerequisites to irrevocability constitute a recognition of the most serious consequences that flow from such consents: termination of parental rights, the permanent separation of parent from child, and the ultimate adoption of the child. *See Sees v. Baber, supra*, 74 *N.J.* at 217. Because of those consequences, the Legislature severely limited the circumstances under which such consent would be irrevocable. *The legislative goal is furthered by regulations requiring approved agencies, prior to accepting irrevocable consents, to provide advice and counseling to women, making it more likely that they fully understand and appreciate the consequences of their acts. N.J.A.C.* 10:121A-5.4(c)." *In the Matter of Baby M.*, 537A 1227, 1245-46 (emphasis added).

It is clear that under New Jersey law the voluntary and irrevocable nature of the waiver document depends upon the fact that all of the counseling requirements, which are designed to insure that this waiver is informed and truly voluntary, are met. Likewise, under constitutional principles the waiver can be valid only if truly informed and voluntary. (*See*, Pet.). Yet, under the procedure New Jersey provides, the mere allegation that a document exists results in the presumption that all of these requirements were met. It presumes the very facts in issue.

Second, as a result of the existence of the document the state exonerates the proponent of the termination of the mother's rights from having to produce any proofs at all. Not only is the *Santosky* standard not enforced, but no proof from the proponent is required at all in clear contravention of *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

This exposes one of the greatest Due Process violations of the New Jersey law which compels this Court to decide this case on the merits. By characterizing the document as "irrevocable" the document is really being used to circumvent the requirements of *Santosky v. Kraemer*, 455 U.S. 748 (1982) and *M.L.B. v. S.L.J.*, *supra*, because, although there is need for a trial and hearing following the execution of the document, the agency which took the document does not have to prove that it met either State law or Federal constitutional standards by any measure of proof. The burden to prove that the waiver was not voluntary or informed by either State or Federal standard is placed upon the mother whose rights the state proposes to terminate. In what can be characterized, at best, as a careless and arbitrary delegation of the state's power, the statute gives the licensed agency the broad discretion to permit revocation of the mother's waiver, without providing a single word on what criteria should be employed in the exercise of the discretion. N.J.S.A. 9:3-41(a). The agency in this case, of course, ignored the mother's pleas for the return of her child, despite the fact it was in the child's best interest. This statutory scheme must be examined by this Court on its merits.

The respondent also evidences a misunderstanding of the relevance of the fact that other states allow a period of revocation before a waiver of a mother's rights would be enforced. The relevance that petitioner assigns to the fact that about thirty states allow for the revocation of such a waiver, is not, as respondents want to suggest, that if other states "voluntarily" allow revocation, then New Jersey must also (*See*, brief of E.R.B., P. 10-13).

Rather, its relevance goes to the question of the compelling nature of the state interest that respondent asserts is promoted by making the waiver totally irrevocable. The fact that thirty other states have successfully implemented adoption statutes that allow for revocation of a waiver of the mother's rights evidences the fact that there is clearly a less intrusive means for the state to accomplish its goal to use adoption as a means to advance the best interest of the child. Obviously, the state statutory scheme must meet the standards of strict scrutiny because it involves the state's termination of the mother's fundamental rights. *Santosky v. Kraemer, supra.*

The state's interest which the adoption statute promotes is that of the best interest of the child. As petitioner noted it is not in the child's best interests to unnecessarily remove the child from the custody and care of his or her natural mother who wants to raise the child. The need for "finality" of proceedings is valid only if it advances the purpose of the statute, that of promoting the child's best interest. "Finality" is not itself the interest of the state that the statute seeks to promote, because finality can be in conflict, as in this case, with the child's best interest. The finality of the process can be achieved just as easily with a revocation provision. Likewise, the Due Process requirement that the proponent of termination be required to bear the burden of proof by clear and convincing evidence does no more injustice to the child's best interest here than in the situation found in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

It is worth pointing out that the judgement of termination isn't final until the order of adoption is entered. The trial on the fact question surrounding the validity of the mother's waiver occurs after the document is signed as well. In private placement adoptions a waiver of the mother's rights is not even recognized as a basis for termination, and the mother can obtain the return of the child after a "consent" any time up to the entry of the judgment of adoption. *Sees v. Baber*, 377 A.2d 628 (1977); *Baby M.*, 537 A.2d 1227 (1988).

The overwhelming majority of states allow a revocation of the mother's waiver of her rights, or has a judicial hearing to determine the informed voluntary nature of the waiver before it is executed, and many other states allow revocation if it is in the child's best interests. See List of state statutes in addendum to this brief. New Jersey provides for none of these safeguards.

B. The Findings Of The Trial Court

Respondents' reliance upon the findings of the trial court completely misses the point. The findings were made by the use of an incorrect standard of proof, the court placed the burden of proof on the wrong party and assumed the qualities about the waiver that the court had no right to assume.

It is clear from reading the court's findings that the trial judge had found the agency's witnesses lacked credibility in many ways. 39a to 41a. The court found that petitioner B.J.M. cried for fourteen hours after seeing her child, distressed about giving the child up, and found B.J.M. thought it was impossible for her to give up her baby. *See*, 54 a to 57a. Many of the facts found were subject to interpretation with respect to the mother's state of mind.

This is exactly the kind of case in which the burden of proof was decisive. It should be pointed out that B.J.M. had extensive visitation and the child was only a couple of months old when the court conducted the trial. The findings would have been different had the court used the proper standard of proof, especially if he applied the strict requirements for counseling of the mother to insure the informed, voluntary nature of her decision.

CONCLUSION

The individual liberty at stake in this case is one of the most important any woman possesses in all of life. The standards surrounding its termination — especially where that termination is not based upon the best interest of the child, but an alleged waiver of the mother's rights which she both contests in the first instance and seeks to revoke, whether or not there were deficiencies in the original waiver process — must be strictly enforced. This Court should grant the writ of certiorari and determine if the *Santosky* and *M.L.B.* holdings apply to states that use a waiver of the mother's rights as the grounds to terminate the mother's rights over her objection.

Respectfully submitted,

HAROLD J. CASSIDY
Counsel of Record
961 Holmdel Road
Holmdel, NJ 07733
(732) 332-9300

ROBERT W. GOODMAN
50 Main Street
Hackensack, NJ 07601
(201) 488-7100

JOSEPH E. MARLEY
66 W. Mt. Pleasant Avenue
Livingston, NJ 07039
(973) 422-1771

Attorneys for Petitioner

APPENDIX

APPENDIX — ADOPTION STATUTES OF THE FIFTY STATES

1.	Alabama	Ala. Code §§ 26-10A-12(b) (1), (2), & (3) (2000); Alaska Stat. § 25.23.060 (a) (2000)
2.	Alaska	Alaska Court Rules: Rule 9(d) (2001)
3.	Arizona	Ariz. Rev. Stat. § 8-107 (A) (2000)
4.	Arkansas	Ark. Code. Ann. § 9-9-208 (3) (1999); Ark. Code. Ann. § 9-9-220 (1999)
5.	California	Cal. Fam. Code § 8814 (Deering 2001)
6.	Colorado	Colo. Rev. Stat. § 19-5-103 (7) (a) (I), (II), & (III) (2000)
7.	Connecticut	Con. Gen. Stat. Ann. § 45a-715 (d) (2001); Con. Gen. Stat. Ann. § 45a-717 (a) (2001)
8.	Delaware	13 Del. C. § 907 (a) (2001); 13 Del. C. § 1107 (f) (2000); 13 Del. C. § 1108 (a) (2001)
9.	Florida	Fla. Stat. § 63.082 (2001); Fla. Stat. §§ 39.801 (3) (a), & (d) (2000); Florida Rules of Court: Rule 80505 (c) (2001)
10.	Georgia	O.C.G.A. § 19-8-5 (a) (2000); O.C.G.A. § 19-8-5 (c) (2000)
11.	Hawaii	

Appendix

12. Idaho	Idaho Code § 16-2005 (e) (2000); Idaho Code § 16-2005 (g) (2000)
13. Illinois	§ 750 ILCS 50/10 (H) (2001)
14. Indiana	Burns Ind. Code Ann. § 31-35-1-8 (2000); Burns Ind. Code Ann. § 31-35-1-10 (2000)
15. Iowa	Iowa Code § 232.116 (1) (a) (2001); Iowa Code § 232.116 (3) (2001)
16. Kansas	K.S.A. § 59-2114 (a) (2000)
17. Kentucky	Ky. Rev. Stat. Ann. § 625.040 (1) (2001); Ky. Rev. Stat. Ann. § 625.041 (1) (2001); Ky. Rev. Stat. Ann. § 625.04 (5), & (6) (2001)
18. Louisiana	La. Ch. C. Art. 1121 (A) (2001); La. Ch. C. Art. 1121 (B) (2001); La. Ch. C. Art. 1195 (A) (2001)
19. Maine	18 A.M.R.S. § 9-202 (A) (2) (2000); 18 A.M.R.S. § 9-202 (B) (2) (2000)
20. Maryland	
21. Mass.	Mass. Ann. Laws ch. 210 § 2 (2001)
22. Michigan	MCL § 710.44 (1) (2001)

Appendix

23. Minn.	Minn. Stat. § 259.24 (5) (2000); Minn. Stat. § 260C.301 (5) (2000); Minn. Stat. § 260C.307 (2) (2000)
24. Miss.	Miss. Code Ann. § 93-17-5 (2001)
25. Missouri	Mo. Rev. Stat. § 453.030 (5) (2000); Mo. Rev. Stat. § 453.030 (6) (2000)
26. Montana	Mont. Code Ann. § 42-2-303 (2000)
27. Nebraska	Neb. Stat. Ann. § 43-106 (2001)
28. Nevada	Nev. Rev. Stat. Ann. §127.053 (5) (2001)
29. N.H.	N.H. Rev. Stat. Ann. § 170-B:8 (II) (2000)
30. N.J.	N.J. Stat. § 9:3-41 (a) (2001)
31. N.M.	N.M. Stat. Ann. §§ 32A-5-23 (A) (1), (2) (2001)
32. New York	NY CLS Dom. Rel. §§ 115b (2) (a) & (b) (2001); NY CLS Dom. Rel. §§ 115b (4) (a) (ii), (b) (2001)
33. N.C.	N.C. Gen. Stat. § 48-3-605 (a) (2000); N.C. Gen. Stat. §§ 48-3-605 (c) (1), (2), (3), & (4) (2000)
34. N.D.	N.D. Cent. Code § 14-15-07 (1) (c) (2001)

35.	Ohio	ORC Ann. § 3107.08 (A) (4) (Anderson 2001)
36.	Oklahoma	10 Okl. St. § 7503-2.3 (C) (2000); 10 Okl. St. § 75032.7 (G) (2000)
37.	Oregon	
38.	PA	23 Pa.C.S. § 2711 (D) (2) (2001)
39.	Rhode Island	
40.	S.C.	S.C. Code Ann. § 20-7-1705 (A) (2000)
41.	S.D.	S.D. Codified Laws § 25-5A-15 (2001); S.D. Codified Laws § 25-5A-16 (2001)
42.	Tennessee	Tenn. Code Ann. § 36-1-111 (b) (2001)
43.	Texas	Tex Fam. Code §§ 161.103 (a) (1), (2), & (3) (2000)
44.	Utah	Utah Code Ann. §§ 78-30-4.18 (1) (a), (b) (2001)
45.	Vermont	15A V.S.A. §§ 2-405 (a) (1) & (2) (2001); 15A V.S.A. §§ 2-405 (d) (1) & (2) (2001)
46.	Virginia	Va. Code Ann. § 63.1-219.39 (2001); Va. Code Ann. § 63.1-219.40 (2001)

47.	Washington	Rev. Code Wash. § 26.33.090 (1) (2001); Rev. Code Wash. § 26.33.090 (2) (2001); Rev. Code Wash. § 26.33.090 (3) (2001)
48.	W.V.	W. Va. Code § 48-4-3a (b) (2001)
49.	Wisconsin	Wis. Stat. § 48.41 (2) (a) (2000)
50.	Wyoming	Wyo. Stat. § 1-22-109 (c) (i) (2001); Wyo. Stat. § 1-22-109 (c) (ii) (2001)